

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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: :  
DELSHAH 60 NINTH, LLC, : : 20-CV-5905 (JMF) (SLC)  
Plaintiff, : :  
: :  
-v- : : MEMORANDUM OPINION  
FREE PEOPLE OF PA LLC, : : AND ORDER  
: :  
Defendant. : :  
: :  
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JESSE M. FURMAN, United States District Judge:

This case, familiarity with which is presumed, involves a commercial rent dispute arising from the first few months of the COVID-19 pandemic. On August 17, 2022, the Court issued an Opinion and Order adopting in part and modifying in part Magistrate Judge Sarah Cave's Report and Recommendation. ECF No. 119 ("Opinion"); *see* ECF No. 114 ("R&R"). In that Opinion and Order, the Court granted summary judgment in favor of Plaintiff Delshah 60 Ninth LLC ("Delshah") on liability and referred the case to Magistrate Judge Cave for an inquest on damages. Opinion 9. Most relevant for present purposes, the Court deemed a handful of affirmative defenses pleaded by Defendant Free People of PA LLC ("Free People") in its answer, including "failure to mitigate," abandoned. *See* Opinion 7-8 n.4. On August 31, 2022, Free People filed a motion seeking reconsideration of the Court's decision deeming the failure-to-mitigate defense abandoned. *See* ECF No. 122 ("Def.'s Mem."), at 1. Free People argues it did not abandon the defense because neither party raised it in their summary judgment briefing and Magistrate Judge Cave did not address it in the R&R. *See id.* at 4-8.

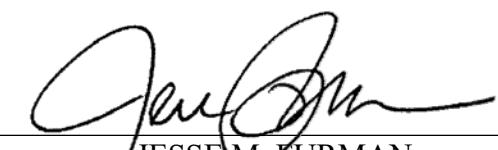
In a sense, Free People's motion is academic. That is because the failure to mitigate is relevant only to damages, not to liability, *see, e.g., Aetna Cas. & Sur. Co. v. Aniero Concrete*

*Co.*, 404 F.3d 566, 608 (2d Cir. 2005) (per curiam) (holding that the affirmative defense of failure to mitigate damages “does not bar the entry of summary judgment as to liability”), and, as Delshah concedes, the question of mitigation can and will be addressed by Magistrate Judge Cave as part of the inquest given the terms of the parties’ lease, *see* ECF No. 127 (“Pl.’s Opp’n”), at 3-4; ECF No. 75-1 (“Lease”), at § 22(e). That said, Free People is technically correct in arguing that the Court erred in deeming the failure-to-mitigate defense abandoned because the issue was never raised in Delshah’s summary judgment briefing or, for that matter, in its objections to Magistrate Judge Cave’s Report and Recommendation. *See Pro. Merch. Advance Cap., LLC v. C Care Svcs., LLC*, No. 13-CV-6562 (RJS), 2015 WL 4392081 at \*5 (S.D.N.Y. July 15, 2015) (declining to dismiss an affirmative defense where neither party briefed it in summary judgment motions); *cf. Summit Health Inc. v. APS Healthcare Bethesda, Inc.*, 993 F. Supp. 2d 379, 397-98 (S.D.N.Y. 2014) (deeming an affirmative defense abandoned where the defendant had failed to respond to the plaintiff’s motion for summary judgment as to the defense). Accordingly, and if only out of an abundance of caution, Free People’s motion for reconsideration is GRANTED and the failure-to-mitigate defense is deemed reinstated.

The Clerk of Court is directed to terminate ECF No. 121.

SO ORDERED.

Dated: October 4, 2022  
New York, New York



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JESSE M. FURMAN  
United States District Judge